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 Federal Communications Commission  
 Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-13

In the Matter of

Amendment of Section 73.202(b)	RM-8156
Table of Allotments	RM-8234
FM Broadcast Stations	
(Blanchard, Louisiana and	
Stephens, Arkansas)	

**MEMORANDUM OPINION AND ORDER**  
**(Proceeding Terminated)**

Adopted: July 31, 1995; Released: September 11, 1995

By the Commission:

1. The Commission has before it an Application for Review ("Application"), filed with respect to the *Report and Order* in this proceeding, 8 FCC Rcd 7083 (1993), which granted the request of Daryl L. Bordelon ("Bordelon") and allotted channel 271C3 to Blanchard, Louisiana as its first local aural transmission service. The Application was filed by Arkansas Wireless Company ("Wireless"), which had filed a counterproposal in the proceeding requesting allotment of Channel 271A to Stephens, Arkansas as its first local aural transmission service. Bordelon filed an Opposition, and Wireless filed a Reply. Additionally, Wireless filed a Motion for Stay of the filing window. No oppositions were filed to the Motion for Stay. We hereby deny the Application for Review and dismiss the companion Motion for Stay as moot.

**I. BACKGROUND**

2. The *Report and Order* allotted Channel 271C3 to Blanchard, Louisiana as its first local service, denying Wireless' counterproposal to allot Channel 271A to Stephens, Arkansas as that community's first local service. In making that decision, the staff evaluated the case under the fourth allotment priority, other public interest matters, since both the proposal and counterproposal would have provided a first local service (under priority 3).<sup>1</sup> The *Report and Order* noted that the proponents had not offered evidence to distinguish their proposals but that a Commission engineering analysis had indicated that both communities are well-served by reception services (Blanchard -- ten FM,

21 daytime AM, and 3 nighttime AM; Stephens -- 7 FM and 10 daytime AM). Thus, the *Report and Order* based its decision on the fact that Blanchard is the larger community, with a 1990 population of 1,175 as opposed to 1,137 for Stephens. While admitting that the difference is small, the *Report and Order* noted that this was the only distinguishable factor between the two proposals.

3. *Application for Review of Wireless.* Wireless argues that the Commission must review the *Report and Order* based on the "very slight difference" in population between the two communities (38 people) and "because of the limited analysis made of other public interest factors." Application, p. 2. Wireless argues that the cases cited in the *Report and Order* are inapposite because the population differences are not as small as in the instant case. *Id.* at p. 3. Wireless also argues that Blanchard is within the Shreveport MSA and its "urbanized area," while Stephens is not. Wireless notes that Stephens is in a rural area and a new service to Stephens would greatly benefit the people who live in that area. *Id.* at p. 3. Wireless argues that, while it may be factually correct to say that both communities are reasonably served, service to the two communities is not equivalent because Stephens has no nighttime AM service and because Blanchard has from 50% to 100% more radio services in each of the FCC-enumerated categories than does Stephens. Thus, according to Wireless, population is not the only difference between the two communities. *Id.* at p. 4.

4. Wireless further argues that where the two communities are this close in population, the Commission "must conduct a significant review of the public interest matters which should be considered in making an allocation." *Id.* These factors, according to Wireless, are: (1) "the presence of a major metropolitan area which affects one community as a suburb while the other community has no such comparable benefit"; (2) the presence and activity level of other media within the potential communities of license, which, according to Wireless, provide less service to Stephens; and (3) that Stephens has a black population of 434 persons, while Blanchard has 7 black residents, which, according to Wireless, indicates that Blanchard is a white bedroom community of a large city, while Stephens is a rural community with a significant minority population. Wireless also suggests that the population of Stephens may be higher since the black population may have been undercounted in the 1990 census by 4.8 percent. Accordingly, Wireless claims that the staff decision is arbitrary and capricious because the staff based it on insufficient information and that the staff should have issued a Further Notice to request additional information regarding the communities.

5. *Opposition to Application for Review of Bordelon.* Bordelon argues that the Commission staff correctly selected Blanchard, the more populous community, over Stephens.<sup>2</sup> While agreeing that Blanchard receives more reception service than Stephens, Bordelon argues that reception of service from a nearby larger community is no substitute for local service. Bordelon further notes that

<sup>1</sup> The FM allotment priorities are:

- (1) First full-time aural service.
- (2) Second full-time aural service.
- (3) First local service.

(4) Other public interest matters.

Priorities 2 and 3 are given co-equal weight. See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

<sup>2</sup> Opposition, p. 3.

Blanchard's alleged status as a white bedroom community versus Stephens' as a rural community with a significant minority population has no significance under the allotment priorities.<sup>3</sup> Further, Bordelon finds no significance in the undercounting of minorities alleged by Wireless, noting that the Commission must rely on the Census. Finally, Bordelon attached an exhibit demonstrating that the proposed Blanchard channel would serve 342,776 persons in an area of 4,779.4 square kilometers, while the proposed Stephens station would serve 33,337 persons within an area of 2,501.7 square kilometers. The Blanchard station would serve 118,342 blacks, compared to 10,938 blacks served by the Stephens station. Thus, the Blanchard station would serve more than 10 times as many people, including almost 11 times more blacks.<sup>4</sup>

6. *Reply of Wireless.* Wireless contends that the Commission has never before based a distinction on population grounds on a number as small as 38 people. Wireless asks the Commission to delineate a framework of tests to be used in a very close case between two equally deserving communities.

7. *Motion for Stay of Wireless.* Wireless also seeks a stay of the filing window, arguing that it is likely to prevail because neither of the two cases cited as authority by the staff involved population differences as small as in the instant case and because Stephens will be preferred based on other factors. Wireless argues that the parties will not be injured by waiting, that the stay would conserve the resources of the parties and the Commission, and that Wireless would be injured absent a stay since it has expended significant time and effort in seeking the Stephens channel. The filing window for Blanchard has opened and closed. Several mutually exclusive competing applications for construction permit have been filed for Channel 271C3 at Blanchard, and these applications remain pending. Given our disposition of the Application for Review, the Motion for Stay is moot.

## II. DISCUSSION

### A. Procedure

8. *New Arguments.* Under Section 5(c)(5) of the Communications Act, 47 U.S.C. § 155(c)(5), and Section 1.115(c) of the rules, 47 C.F.R. § 115(c), no application for review will be granted if it relies upon questions of fact or law upon which the designated authority has been afforded no opportunity to pass. See *Kenny D. Hopkins*, 5 FCC Rcd 604, 605 (1990). Wireless' Application relies upon the argument that the Commission staff erred because it made the decision in this case only on population grounds and did not consider other significant differences between the two communities. The staff has had no opportunity to pass

on these arguments or on the alleged other differences between the two communities. As the Application raised factual issues not first raised to the designated authority, it is subject to dismissal as defective.

9. *Factors warranting review.* Under Section 1.115(b)(2), 47 C.F.R. § 115(b)(2), an application for review must list the factors warranting Commission consideration from among an enumerated list. Absent compliance, the application may be dismissed as procedurally defective. See *Chapman S. Root Revocable Trust*, 8 FCC Rcd 4223, 4224 (1993). The Application did not list the factors warranting Commission review. Accordingly, the Application is subject to dismissal as defective. Nonetheless, despite the foregoing procedural defects, we will briefly consider the arguments made in the Application on our own motion.

### B. Merits

10. Contrary to Wireless, the *Report and Order* did not err in basing its decision in this case on the population difference between the two communities. While the population difference involved in the instant case is small, nonetheless, on the facts of this case, and in applying the FM allotment priorities, it is dispositive. In *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982), the Commission noted that it would compare population sizes in resolving a choice between counterproposals invoking co-equal priorities 2 and 3. Moreover, it noted that the comparison under priority 4 "can take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities...." *Id.* at n. 8.

11. Accordingly, in a choice among competing counterproposals both involving priority 3 (first local service), the Commission has uniformly made the decision based on population difference and a comparison of reception services. And, where it has found that neither community falls below a threshold level of reception services, the Commission has based its decision on a straight population comparison. Thus, in *Report and Order (Northweye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri)* in MM Docket No. 89-120,<sup>5</sup> we compared two competing counterproposals that would have provided a first local service based on population, noting that "[s]ince both communities have at least 6 reception services, the comparison should be made based on the population of the communities."<sup>6</sup> Further, in *Report and Order (West Liberty and Richwood, Ohio)* in MM Docket No. 90-131,<sup>7</sup> the staff allotted the channel to Richwood based on its larger population (2181 vs. 1653) where Richwood received six aural services and West Liberty received five, finding that neither community was therefore underserved.<sup>8</sup>

<sup>3</sup> *Id.* at p. 4.

<sup>4</sup> *Id.* at p. 5.

<sup>5</sup> 7 FCC Rcd 1449, 1452 (Chief, Allocations 1992).

<sup>6</sup> See also *Report and Order (Seymour and Pigeon Forge, Tennessee)* in MM Docket No. 86-98, 2 FCC Rcd 2016 (Chief, Policy and Rules 1987) (since both communities receive at least 5 aural services, comparison under priority 3 will be made based on population).

<sup>7</sup> 6 FCC Rcd 6084 (Assistant Chief, Allocations 1991).

<sup>8</sup> *Accord, Report and Order (Three Oaks and Bridgman, Michigan)*, 5 FCC Rcd 1004 (Chief, Allocations 1990) (Bridgman

preferred based on population (2235 vs. 1774); not distinguishable based on reception services (Bridgman -- 5 FM, 12 daytime AM, 5 nighttime AM; Three Oaks -- 6 FM, 10 daytime AM, 5 nighttime AM); *Report and Order (Obion and Tiptonville, Tennessee)* in MM Docket No. 90-22, 7 FCC Rcd 2644 (Acting Chief, Allocations 1992) (both communities are well-served with Obion having 17 and Tiptonville 18 aural services, so Tiptonville is preferred based on larger population (2149 vs. 1,241); *Report and Order (Brownstown, Cannelton and Edinburgh, Indiana, et al.)* in MM Docket No. 91-271, 7 FCC Rcd 3173, 3176 (Acting Chief, Allocations 1992) (as neither of 2

12. Wireless argues that *Three Oaks and Bridgman, Michigan*,<sup>9</sup> cited in the *Report and Order*, is not on point because, in the instant case, there is no equivalence finding in the availability of reception services, no analysis of the type or status of the communities and their relationship to surrounding communities or rural areas, nor any analysis of whether the community is a town or city. Application, p. 7. However, contrary to Wireless, the decisional factor in *Three Oaks* was the population difference, and the Commission noted that although the population difference there was small, "on any other conceivable and documented evidentiary basis for a decision, the proposals are even less distinguishable." 5 FCC Rcd at 1004. Wireless also claims that *Bostwick and Good Hope, Georgia*,<sup>10</sup> also cited in the staff decision, is inapposite because in that case, although the population difference was small--120 persons--Bostwick, the preferred community, was almost 50% bigger than Good Hope and received less radio service (four fewer Atlanta FM stations than Good Hope). Nonetheless, contrary to Wireless' contention, the decision in Bostwick was made on the basis of the population difference alone. As the *Report and Order* stated: "The new allotment should be given to Bostwick as the larger of the two communities."<sup>11</sup>

13. Wireless has cited no reason or legal precedent to cause us to reverse this long-standing precedent. Accordingly, as neither community is underserved, we find that the staff did not err in basing its comparison between the two communities on the difference in their population.<sup>12</sup> Further, as Bordelon indicates, even though Blanchard receives more signals than Stephens, reception of service from another community is no substitute for local service.<sup>13</sup> Because there was a tie underp the FM priorities since both competing proposals propose a first local service under priority 3, the tie was resolved by examining the proposals under priority 4, and, in examining the proposals under priority 4, substantial weight was given to the population of the community sought to be served, as the proposals seek to provide a first local transmission service. Thus, as the staff did not err in basing its decision in this case on the population difference between the two communities, we decline to delineate a framework of tests to be used in a very close case between two equally deserving communities, as requested by Wireless. Further, while Wireless suggests that the staff ignored other factors and should have

invited further comment with respect to additional factors based on the small population difference in this case, these factors were not brought to the staff's attention during the rule making.<sup>14</sup> Moreover, Wireless points to no legal precedent for imposing such an obligation to seek additional comments. Finally, as the population difference is dispositive, the other factors raised by Wireless are irrelevant. We leave in place the staff decision.

14. Accordingly, IT IS ORDERED That the Application for Review filed by Arkansas Wireless Company IS DENIED.

15. IT IS FURTHER ORDERED That the Motion for Stay IS DISMISSED as moot.

16. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

communities is underserved and each receives ample aural reception service (33 for Edinburgh and 22 for Brownstown), Edinburgh gets the channel based on greater population (4536 vs. 2872). See also *Report and Order (Bostwick and Good Hope, Georgia)* in MM Docket No. 89-566, 6 FCC Rcd 5796 (Assistant Chief, Allocations 1991) (Bostwick preferred based on population (370 vs. 250); both communities well served (9 for Bostwick vs. 13 for Good Hope)).

<sup>9</sup> 5 FCC Rcd 1004 (Chief, Allocations 1990).

<sup>10</sup> 6 FCC Rcd 5796 (Assistant Chief, Allocations 1991).

<sup>11</sup> 6 FCC Rcd at 5796.

<sup>12</sup> Wireless argues that the population difference between the two communities should be negated because Stephens has a larger minority population and because blacks were undercounted in the 1990 census. These arguments have no merit. Wireless has provided no specific evidence that blacks in Stephens were undercounted. Moreover, absent an alternative authoritative source of population data, we have traditionally relied and will continue to rely on Census figures in the implementation of our rules.

<sup>13</sup> *Report and Order (Rochester and Walton, Indiana)* in MM

Docket No. 92-192, 8 FCC Rcd 955, 957 (Chief, Allocations 1993); *Report and Order (Conklin, New York)* in MM Docket No. 88-166, 5 FCC Rcd 1104, 1105 (Chief, Allocations 1990); *Report and Order (Clinton, Louisiana)* in BC Docket No. 78-367, 45 RR 2d 1587, 1588 (Chief, Broadcast Bureau 1979).

<sup>14</sup> With respect to these additional factors, moreover, we do not consider the comparative minority populations of two communities under our allotment priorities. While we did adopt a minority service priority in Docket No. 84-231, the omnibus allotment rule making to implement Docket No. 80-90, *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 100 FCC 2d 1332 (1985), we noted that such a priority is a matter more appropriately considered in the hearing process than in the allotment phase. Id. at 1336, 1337. In any event, we have subsequently held that the Docket 84-231 allotment priorities did not supplant the FM allotment priorities established in 1982. *Warren and Niles, Ohio*, 59 RR 2d 1179, 1182 (Chief, Policy and Rules Div. 1986).